

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

3	UNITED STATES OF AMERICA,	:	
4	vs.	:	DOCKET NUMBER
5	JAMES G. MALONEY,	:	1:16-CR-0237
6	DEFENDANT.	:	ATLANTA, GEORGIA
		:	OCTOBER 5, 2016

TRANSCRIPT OF AUDIOTAPED PRETRIAL CONFERENCE PROCEEDINGS  
BEFORE THE HONORABLE JUSTIN ANAND  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES OF COUNSEL:

**FOR THE GOVERNMENT:**

STEPHEN H. MCCLAIN  
JOHN RUSSELL PHILLIPS  
UNITED STATES ATTORNEY'S OFFICE

FOR THE DEFENDANT:

CRAIG C. GILLEN  
ANTHONY C. LAKE  
GILLEN WITHERS & LAKE LLC

**MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED  
TRANSCRIPT PRODUCED BY:**

OFFICIAL COURT REPORTER

*SHANNON R. WELCH, RMR, CRR  
1949 UNITED STATES COURTHOUSE  
75 TED TURNER DRIVE, SOUTHWEST  
ATLANTA, GEORGIA 30303  
(404) 215-1383*

## PROCEEDINGS

(Atlanta, Fulton County, Georgia; October 5, 2016.)

3 THE COURT: All right. We're on the record. This is  
4 the case of the *United States of America vs. James Maloney*,  
5 1:16-CR-237. We have the counsel for the Government,  
6 Mr. Phillips and Mr. McClain, here, as well as counsel for the  
7 defendant, Mr. Gillen and Mr. Lake.

8 I asked for the parties to come in to speak further  
9 about the procedures going forward about the Classified  
10 Information Procedures Act and in particular the Government's  
11 response to the defendant's notice of intent, which is  
12 Document Number 23.

19 The defendant, therefore, I'm ordering to perfect the  
20 notice, Document Number 22, with more precise identification of  
21 the information obviously without disclosing actual classified  
22 information but to describe the information that the defendant  
23 already is aware of and would seek to disclose at trial and  
24 also to tee up any disputes about information in the  
25 Government's possession that the defendant does not already

1 have by making precise requests -- Brady requests and, if  
2 necessary, motions to compel to the Court for the -- for  
3 obtaining discovery not already in his possession and to do  
4 those things within 30 days to further identify the potential  
5 areas of classified information that the defendant is raising.

6 So I think in sum we're talking about identifying to  
7 the extent possible specific statements the defendant would  
8 make or would otherwise elicit from others as to the -- as to,  
9 for example, whether specific transactions or purchases that  
10 are otherwise charged in the indictment were for the purposes  
11 of the contract and any conversations, meetings, or documents  
12 that the defendant believes exist that may memorialize those  
13 discussions.

14 But it is understood that the defendant's  
15 particularized response would not go so far as to actually  
16 explain the purposes of the contract, that being classified.  
17 But to further particularize the information that would be  
18 shared as to specific transactions and that were for purposes  
19 of the contract and whether there were conversations,  
20 memoranda, or documents that may exist in support.

21 So that would be due within 30 days. And then the  
22 Government independently was already going to submit -- and I  
23 understand is still going to do that -- a brief to the Court --  
24 a brief outlining the procedures, the CIPA procedures for  
25 proposal for how we would go forward.

1                   And based on the proposal -- I'm sorry -- the notice  
2 that is submitted, I will call for a Government response within  
3 30 days of that as to reacting specifically to the items that  
4 are noticed.

5                   Okay. Anything further that either side -- that  
6 y'all want to put on the record here?

7                   UNIDENTIFIED MALE: Just for clarification, Your  
8 Honor, I understood that the response that we filed to the  
9 notice of intent to disclose classified information was the  
10 brief that you wanted us to file.

11                  Are you saying now there is something else you want  
12 us to brief on the CIPA issue outlining the procedures?

13                  THE COURT: Well, I thought you were going to get to  
14 me a -- a more nuts-and-bolts explanation of what the  
15 procedures would be, what we would have to do.

16                  And if there was discovery review of classified  
17 information or if I had to do in-camera review of classified  
18 information or we had to have hearings where the content was  
19 disclosed, what the procedures would be, who and how would --  
20 who we would have to clear and how that would -- how that would  
21 occur, whether that would include court staff and at what  
22 levels. A facility -- is there an appropriate facility here in  
23 this courthouse where we would have such a hearing?

24                  I thought we were going to -- I was going to get a  
25 little more nuts-and-bolts information on those sort of things

1 is what I was envisioning.

2 UNIDENTIFIED MALE: Okay. I was not aware of that.

3 That is not what I included in my previous brief. I mean, all  
4 of those procedures are outlined in CIPA. Each section talks  
5 about a different stage and what happens. And I can certainly  
6 outline that for the Court if you would like me to.

7 THE COURT: That would be helpful.

8 UNIDENTIFIED MALE: Okay. I'll do that.

9 UNIDENTIFIED MALE: I mean -- and I heard you just  
10 say this, which is in response to their renewed notice we could  
11 file something like that because -- and Mr. Phillips  
12 understands CIPA better than I do.

13 But I think our response to what the appropriate  
14 procedures should be will depend and could depend on what  
15 information they are noticing up. Because we may say, let's  
16 have a hearing. We may say, fine, it can be disclosed. We may  
17 say -- you know, so I think -- and that is why we filed the  
18 brief we did. Because we think that is insufficient, there was  
19 no need for a hearing, there was no need for further procedure  
20 at this point, given what had been done in the notice. That  
21 the appropriate response under *Collins* was it is insufficient;  
22 we're done. Obviously, the ball is in their court. They can  
23 change that.

24 And then our view of what the appropriate procedure  
25 is can then be altered if they then meet what in our view is an

1 insufficient or a *Collins* compliant notice.

2                   But I mean, I think Your Honor saying let us file  
3 something after they file their amended notice and we would  
4 propose that in that response that us propose procedures to the  
5 Court or at least -- I'm sort of thinking out loud. But that  
6 is how I think that we would like to handle those proposed  
7 procedures to the Court in light of what they say.

8                   And in that notice we can -- if it was sufficient  
9 here, it would be appropriate. Our view is it is not  
10 sufficient. Therefore, here is the procedure that is  
11 appropriate.

12                  So I think we can cover the sort of -- the entirety  
13 of it of what the appropriate procedures are and then take a  
14 position on, you know, which of those avenues should be taken  
15 in light of their amended notice.

16                  THE COURT: Well, I guess that is what I thought your  
17 current response lacked. So if it has that, then that is fine  
18 with me. If, in other words, it gives me -- if I disagree with  
19 the position you're articulating, then what is the road we go  
20 down and what do we need to do?

21                  What are the different -- depending on what doors are  
22 opened, where do we go, notwithstanding which door you think I  
23 should open, if that makes sense. But, otherwise, that is  
24 fine.

25                  Mr. Gillen?

1                   MR. GILLEN: Yes, Your Honor. First, my recollection  
2 is when we met here before that there were two deadlines. One,  
3 the deadline they said they wanted to file a written response  
4 to our notice, which they did. But they were also to file, as  
5 the Court remembers, an outline in terms of they were going to  
6 speak with Washington in terms of the national security folks  
7 to get a procedure in terms of how to go forward.

8                   At that time in our previous hearing, my recollection  
9 was that we were talking about trying to get something where  
10 there would be an expedited review -- a background review for  
11 defense counsel to have a clearance. So that if the Court  
12 deemed it necessary to have a more specialized or  
13 particularized *Collins* filing, then that would be -- it could  
14 be done with the knowledge of the defendant giving to his  
15 lawyers all the information that he had such that we could then  
16 go forward and let the Government know what we think is  
17 relevant and necessary and material to a defense of Dr. Maloney  
18 in a federal criminal indictment they brought on the very  
19 project that their own indictment says -- references  
20 Dr. Maloney's dealings with the intelligence agencies.

21                   This is not some drug dealer who says, oh, yeah, the  
22 CIA said that I could bring -- like the *Rosenthal* case we  
23 talked about back there.

24                   In their own indictment, they acknowledge  
25 Dr. Maloney's dealings with the intelligence agencies. So my

1       recollection was that the process was going to be that. They  
2       were going to file some response, which they have done. And  
3       that subsequent -- that subsequently they were going to be  
4       filing something regarding procedure and I thought also in  
5       expediting for background checks for defense counsel.

6               Now, that is what I thought. The record will speak  
7       for itself. The Court can modify obviously its initial  
8       position. But in the modification that the Court has given  
9       today, this is the -- one of the issues that I have.

10              We will comply. We will try to get -- we will try to  
11       walk that -- the razor's edge of saying here, Your Honor, we're  
12       trying to be more specific and more detailed but yet not  
13       disclosing classified information.

14              All of this could easily be handled. With a  
15       background check or a waiver from the Department of Justice, we  
16       could give the court everything right now so that we can make a  
17       determination.

18              CIPA is about the balancing of a citizen's right to a  
19       fair trial in the United States of America when charged with  
20       felonies and the nation's concerns about keeping safe and  
21       secret its classified information. That is the balancing test.

22              In our review, respectfully, the process presently  
23       articulated by the Court throws that out of balance. What  
24       you're asking us to do is to file something without knowing the  
25       full picture or without knowing all the details. And yet the

1 defense is saying -- excuse me -- the Government is saying we  
2 don't think under *Collins* it is specific enough.

3 We will be more than happy to make sure that the  
4 Court gets all of the data and information that it deems to be  
5 relevant in detail from the defense. We just want to make sure  
6 that Dr. Maloney doesn't have to say, gee, can I tell  
7 Mr. Gillen this or can I not tell him that, so that we can  
8 trigger the mechanism of being specific enough to warrant  
9 background checks so that we can supplement our notice with  
10 even more detail. Or is he going to run the risk -- we have  
11 already been threatened once by the Government in an e-mail  
12 concerning whether or not Dr. Maloney would be giving any  
13 classified information to his own lawyers.

14 Now, we believe that we have got Sixth Amendment  
15 issues here. Dr. Maloney has a right under the Sixth Amendment  
16 to the right of counsel. Not somebody who is wearing  
17 blindfolds and trying to guess about the specificity necessary  
18 to defend -- to defend him in a case where they specifically  
19 name the very project that he wants to tell the jury about --  
20 the very project.

21 So we will do what the Court says. We will -- within  
22 30 days. And I appreciate the Court's indulgence on the 30  
23 days. I did mention in chambers we have this matter up in Cobb  
24 County that we're focusing a lot of our energies on. So we do  
25 need that time.

1                   The other matter is that when we were last here we  
2 talked about problems with Rule 16. Subsequent to that hearing  
3 then, we received a hard drive from the Government, which has  
4 taken apparently four or five days to actually copy. I haven't  
5 even had a chance to look at it yet.

6                   I would like the Court at that time -- the last time  
7 we were before the Court, you said, all right, well, look at  
8 the supplemental Rule 16; and if there are any additional  
9 motions that you need to file regarding the discovery or  
10 regarding Rule 16 material, then file that at the time that the  
11 Government is to file their CIPA procedure notice, which is --  
12 I forget -- would be in two weeks or something like that or  
13 whenever it was -- ten days.

14                  I would ask the Court to allow us the 30 days that we  
15 will have for the supplementation of our CIPA notice to also  
16 file any additional Rule 16 motions that we would have. I have  
17 not had time to review the discovery material, which has been  
18 presented to the defense after the last hearing that we had.

19                  THE COURT: Any objection to that?

20                  UNIDENTIFIED MALE: I'm not sure I understand what he  
21 says. I mean, if he's asking for more time to file more  
22 motions, then I don't know that the Court really cares what I  
23 think about that.

24                  THE COURT: Well, I care -- I mean, in the sense that  
25 you have a right to object to anything. That is what I mean.

1 Any objection to --

2 UNIDENTIFIED MALE: Well, I would just like to note  
3 for the record that the Government filed its response to the  
4 CIPA notice at least two weeks before the deadline that the  
5 Court gave us. We didn't take the whole time that the Court  
6 had allowed us to do that. So we were very prompt in doing  
7 that.

8 And when we left the previous pretrial conference and  
9 I represented to the Court that we were going to be providing  
10 additional discovery to the defense, we did that promptly.

11 As soon as we received the blank hard drive that they  
12 gave us to copy the -- or to image the laptops that the  
13 defendant had had access to at Georgia Tech, we immediately  
14 gave that to the FBI. And they immediately copied those hard  
15 drives. And we immediately gave them back to the defense.

16 And --

17 THE COURT: Well, I mean, I'm not sure if I'm hearing  
18 anything otherwise from Mr. Gillen. I think he's just saying,  
19 I've got a whole lot of stuff. It took a few days to copy. It  
20 is -- and can I have 30 days to file motions that may come  
21 relevant as a result of this?

22 I'm not hearing you object to that.

23 UNIDENTIFIED MALE: I don't object to that.

24 THE COURT: Okay. Okay. So that is what I'm getting  
25 at.

1                   UNIDENTIFIED MALE: I just wanted to make clear,  
2 though, the Government hasn't done anything to delay the  
3 process or prevent him from being able to file under the  
4 previous deadline that he had.

5                   THE COURT: Okay. Understood.

6                   All right. So that is fine. The 30 days will  
7 include leave to file any new Rule 16 motions that may be  
8 necessitated by the review of the newly received discovery.

9                   The -- the only thing I would say in response to what  
10 you said, Mr. Gillen, is the -- all I'm ordering here is  
11 further perfection of the notice of intent and any issues that  
12 arise from the filing of your perfected notice. In other  
13 words, any dispute at that point about what should be permitted  
14 to be shared, what should not be permitted, how to deal with  
15 any disputes would be at that point to discuss.

16                   So nothing that you've described in my view is ripe  
17 right now to discuss. You identify the information that you're  
18 intending to get into at trial. And it could be the  
19 Government doesn't dispute the disclosure of that information  
20 or it does on relevance grounds and we can hash that out.

21                   Ultimately, you have requested a procedure where you  
22 get cleared now. I'm not sure that is not the best way to go.  
23 But I don't believe and I've not been presented with authority  
24 under CIPA that allows me -- allows the Court to order the  
25 Government to clear someone for national security clearance.

1           It may be the better way to go here, the more  
2 efficient way to go. But I don't see it as my authority under  
3 the statute to order that procedure.

4           Ultimately, the Court has the authority to give a  
5 defendant appropriate relief if they are being denied a fair  
6 trial or fair access to the right of counsel. And you haven't  
7 made that motion right now. And I don't know -- that will  
8 ultimately be necessary. But that is ultimately a right you  
9 have to request. That is the authority the Court has. I don't  
10 have the authority to order them to clear you.

11           So we're going to take this in steps. We're going to  
12 have you perfect the motion as best you can. We're going to  
13 get the Government's response. And I'm hopeful that will at  
14 least narrow issues and deal with whatever remaining disputes  
15 exist at that point.

16           I don't know what else to do at this point. That is  
17 my best way of proceeding at this juncture.

18           UNIDENTIFIED MALE: If I may just say one more thing,  
19 Your Honor --

20           THE COURT: Okay.

21           UNIDENTIFIED MALE: Thank you -- as it relates to the  
22 Court's ability to direct them. I would suggest that the Court  
23 does have the ability to order them under the Sixth Amendment  
24 to provide the clearances necessary for a full and complete  
25 defense of Dr. Maloney.

1                   So my position -- I know that you said it might be  
2 premature. It is not premature to us because we're going to  
3 have to sit down with him and begin that razor's edge walk  
4 regarding classified and unclassified to make sure it is  
5 specific enough but not containing classified information.

6                   I think it can be solved by the Court under the Sixth  
7 Amendment ordering the Government to do what we have asked.

8                   THE COURT: Okay. Well, I'm going to leave the  
9 schedule as I have stated it. I don't believe -- well, I  
10 mean -- I interpret -- you haven't made a motion. You've just  
11 asked me to make an order here. I'm not sort of accustomed  
12 to --

13                   UNIDENTIFIED MALE: Well, I was responding to the  
14 Court saying he doesn't believe the Court -- the Court doesn't  
15 believe it has the authority. I will look at the issue, and  
16 perhaps we might file a written motion in that regard. So  
17 I'll, you know --

18                   THE COURT: Fair enough.

19                   UNIDENTIFIED MALE: Rather than simply doing  
20 something orally, I just wanted the Court to know and have the  
21 record reflect --

22                   THE COURT: Fair enough.

23                   UNIDENTIFIED MALE: -- what our position is today.

24                   THE COURT: Fair enough. It is my view -- I haven't  
25 studied this, and maybe you can point me to something. I do

1 not have the authority, including under the Sixth Amendment, to  
2 order the executive branch to clear private citizens for  
3 classified information.

4 Ultimately, my authority under the Sixth Amendment or  
5 more accurately the district court's authority under the Sixth  
6 Amendment is perhaps greater, which is to say, I can't tell  
7 them to give it to you, but if ultimately you can't fairly  
8 represent your client without getting that information, it  
9 would be for dismissal; not for ordering them to give you  
10 clearance.

11 My inclination is to think that is my authority, not  
12 to order clearance. But you can teach me otherwise.

13 UNIDENTIFIED MALE: I don't think that I can teach  
14 the Court anything. But I can state my position.

15 THE COURT: That is not the right word, I guess. But  
16 point me to something because I haven't really researched it.

17 UNIDENTIFIED MALE: My -- to refine my point, it is  
18 not necessarily saying you go ahead and you give today blanket  
19 security top secret clearance for Mr. Gillen and Mr. Lake. But  
20 to order the process to begin is something else.

21 I have had top secret clearance, and I had it for a  
22 number of years when I was with the Attorney General's Office  
23 and I believe I had security or secret level when I was with  
24 the U.S. Attorney's Office.

25 Now, again that is the way it is. I'm not saying

1 that the Court can say -- to give -- maybe he can; maybe he  
2 can't -- to make the Government give somebody that they don't  
3 believe should have any clearance at all or access to their  
4 secrets access to their secrets. It is the process that we're  
5 talking about here.

6 And then if they were to come back and say, we don't  
7 want to give Mr. -- in spite of the fact Mr. Gillen might have  
8 had top secret code word clearance, we don't want to let him  
9 see any of our secrets any more, then was that an arbitrary  
10 decision? Was that a strategic decision made?

11 That is when we would deal with Sixth Amendment  
12 issues. But I'm saying the process we would hope would go  
13 forward so that we can get this thing under speed.

14 But I understand. I just wanted to state my  
15 position.

16 THE COURT: Understood. Okay. All right. Well, I  
17 think we'll leave it at that, and I'll look for your  
18 submissions. And what I will likely do is -- let me pull up my  
19 calendar here.

20 Let me go ahead and set a conference so we can talk  
21 about the submissions as they are submitted. I don't have my  
22 calendar handy in front me.

23 Bel, do you have your calendar so that I can just  
24 look over your shoulder?

25 So with the schedule that I just stated, 30 days and

1 30 days, this would be approximately teed up in mid November.  
2 So how are y'all that first week in December, the week of the  
3 5th?

4 We're not on duty then; right?

5 It looks like we're fairly wide open that week. For  
6 lack of anything else, I'll propose Tuesday the 6th at  
7 10:00 A.M.

8 MR. PHILLIPS: Your Honor, Mr. McClain and I are  
9 supposed to be at a conference at the NAC learning about CIPA  
10 and national security procedures that week.

11 THE COURT: All right. Well, then we definitely will  
12 benefit from waiting.

13 UNIDENTIFIED MALE: Let's all go.

14 MR. PHILLIPS: The 6th and 7th. And then there is  
15 the SEC conference in Atlanta at the end of the week. So every  
16 day that week we're supposed to be in a seminar.

17 THE COURT: The problem is the next two weeks we're  
18 on duty and --

19 UNIDENTIFIED MALE: Could we do it the week before  
20 that then?

21 THE COURT: Before you have the advantage of all this  
22 training? That is the Thanksgiving week, isn't it? No. That  
23 is after Thanksgiving. Is that right? Okay.

24 UNIDENTIFIED MALE: How about the week after the 6th,  
25 whatever -- the week of the 13th?

1                   THE COURT: The problem is we're on duty then. And,  
2 you know, I don't know how long it is going to take. And  
3 let's -- I mean, the week of the 28th looks okay, if that is  
4 doable for y'all. November 28th.

5                   UNIDENTIFIED MALE: Well, actually --

6                   THE COURT: I hate to give up all this great training  
7 you're going to get the following week.

8                   UNIDENTIFIED MALE: Can we do it after the Court has  
9 duty in December? Because I think it would be helpful for us  
10 to go to that training. I mean, otherwise, we're --

11                  THE COURT: Well, we are really probably talking  
12 about January unless folks are going to be around that week of  
13 Christmas week, which I guess -- I don't know -- I have no  
14 specific plans myself. But I don't normally set things that  
15 week.

16                  UNIDENTIFIED MALE: Can we do January then?

17                  THE COURT: January -- the week of the 2nd?

18                  UNIDENTIFIED MALE: Yes.

19                  THE COURT: That looks pretty good. Okay. All  
20 right. So let's say Tuesday the 3rd -- for those of us who  
21 have taken some time off, it gives us at least a day to  
22 acclimate -- at 10:00 A.M.

23                  Sound good?

24                  UNIDENTIFIED MALE: Yes, sir.

25                  THE COURT: All right.

1                   UNIDENTIFIED MALE: And the purpose of that hearing  
2 would be just so we're clear --

3                   THE COURT: Well, at that point, I'm going to have  
4 their notice. I'm going to have your response and your  
5 response that may include -- I don't know what it is going to  
6 say.

7                   But my hope is it is going to tee up the relevancy  
8 or -- I mean, if there are things that, as you have been  
9 hypothesizing, you might see from the notice and come back and  
10 say, we don't think -- we think that is made up. It didn't  
11 exist. Therefore, we're not taking any position that it is  
12 classified, you can testify to that. You can say all you want  
13 about that because that is not classified. We think it is made  
14 up. But it is not -- in any event, because we think it is made  
15 up, therefore, by definition it is not classified. Therefore,  
16 there is no restriction.

17                  So there may be categories of information that you  
18 respond that way. Then we at least know where we are. There  
19 may be categories of information where you respond and say  
20 we -- that does implicate classified. But we don't believe it  
21 is -- we're going to pose relevance. And here is our argument.  
22 And there may be other responses.

23                  It is my hope we get closure -- I mean, we get it all  
24 teed up at that point. And the purpose of this hearing,  
25 therefore, would as best I can to go through that all with you.

1           I think under CIPA to the extent I'm making rulings  
2 on disputed issues there needs to be a written ruling. So I  
3 don't know if I can give oral rulings on the record. But at  
4 least to have argument about the pleadings at that point.

5           UNIDENTIFIED MALE: Right.

6           THE COURT: And to see where, if anything, we go from  
7 there. Perhaps your response will be as to some of these  
8 things, we still don't know enough. It is still too vague.

9           Mr. Gillen then will say, well, look, I tried my  
10 best. How am I supposed to get -- I -- and how am I supposed  
11 to get farther without clearance? We'll have to -- then we  
12 discuss that again. The -- and where we go from there and how  
13 to break through that chicken and egg.

14           I don't know what all the issues will be. But my  
15 hope is that hearing will be where we go through item by item  
16 and figure out where we are. And at a minimum hopefully narrow  
17 things because, for example, maybe there are things that the --  
18 y'all come back with and say for whatever reason either it is  
19 not classified or technically it is classified but the -- we're  
20 going to see clear to declassify it because we don't want to  
21 fight this and it is not necessary any more. Or we have a  
22 relevance objection. And maybe I'm able to rule on the  
23 relevance objection with what I have.

24           And it perhaps narrows the information and the issues  
25 in dispute. I don't know. That is my hope for this here.

1                   Does that make sense?

2                   UNIDENTIFIED MALE: It does. Thank you.

3                   THE COURT: All right. I think that is all I had. I  
4 mean, I'll just leave it with this. The -- you know, to the  
5 extent, you know, you all as you're looking through this -- and  
6 I'm looking at the Government -- you know, you're free to  
7 take -- and I don't know right now what any rulings will be  
8 because I don't know enough.

9                   But I mean, if you -- I can't order you I don't think  
10 to clear Mr. Gillen let's say. But it -- and I can't tell you  
11 how to prosecute or manage the case from your standpoint.

12                  From what I've heard so far, I am skeptical that at  
13 some level he won't be entitled to know and help his client  
14 prepare for trial with regard to the basics of what the project  
15 was about.

16                  Perhaps the notice will, you know, assist a little  
17 more and get to a little bit more detail. But I'm skeptical  
18 that he would have to go to trial and defend on an indictment  
19 that is fundamentally about alleging that various transactions  
20 were not for the purposes of the contract without being able to  
21 talk to his client about what the contract was about and  
22 without getting his client's assistance in preparing a defense  
23 for trial purposes.

24                  So I guess I'll urge you and suggest as you get his  
25 notice and review his theory of defense as it gets perhaps

1 explained in a little more detail in that notice, you know,  
2 reconsider whether that is something -- I mean, in the end, I  
3 can't order it I don't think. And I don't know whether -- I'm  
4 not saying this would be dismissed or not ultimately because  
5 that is not before me. Although, I do think that would be the  
6 ultimate remedy if we do find he is unable to go to trial and  
7 adequately defend his client.

8 Because these procedures likely take a lot of time, I  
9 would urge you to think about it as you get the notice and  
10 whether it is something that may make sense to just go ahead  
11 and start now.

12 But all I can do at this point is, I guess, make that  
13 suggestion. I can't order it. I can, though, express from  
14 what I've heard some skepticism that at the end of the day the  
15 lawyers would not be permitted to know what the project is  
16 fundamentally about in order to defend the charges that  
17 specific transactions were not related to the project, if that  
18 makes sense.

19 That is not an evidentiary ruling right now. I don't  
20 know enough about this case, and I haven't been presented with  
21 enough to -- it is a reaction -- it is a first blush reaction  
22 to the extent that may be helpful if for nothing else than you  
23 being able to address to me arguments to explain why that sort  
24 of information is irrelevant and should go no farther in  
25 discovery or even defense consultations.

1                   But you will have to maybe explain that to me.  
2   Because my inclination is to think there is a basic right to  
3   discuss and understand what the contract that was the subject  
4   of the fraud charges was about. Because what I'm hearing is  
5   the proffer that at least as to some, perhaps not all, of these  
6   transactions the defendant believes he has a defense that he --  
7   the transactions were relevant under the contract, perhaps even  
8   specifically discussed with security personnel. I don't know.  
9   But at least relevant under the contract goes to his intent.

10                  That may not explain everything, including tennis  
11   ball machines. But there may be other defenses as to those  
12   things. And I'm just skeptical that Mr. Gillen and Mr. Lake  
13   can't discuss that with their client a little bit in advising  
14   him and formulating and preparing a defense.

15                  But I -- that is at this point the most I can say I  
16   think at this point. Okay.

17                  UNIDENTIFIED MALE: Thank you, sir.

18                  THE COURT: We'll be in recess.

19                  UNIDENTIFIED MALE: Thank you.

20                  **(The proceedings were thereby concluded at**  
21                  **3:47 P.M.)**

22

23

24

25

1 C E R T I F I C A T E  
2

3 UNITED STATES OF AMERICA  
4

5 NORTHERN DISTRICT OF GEORGIA  
6

7 I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of  
8 the United States District Court, for the Northern District of  
9 Georgia, Atlanta Division, do hereby certify that the foregoing  
10 23 pages constitute a true transcript of the audiotaped  
11 proceedings had before the said Court, held in the City of  
12 Atlanta, Georgia, in the matter therein stated.

13 In testimony whereof, I hereunto set my hand on this, the  
14 8th day of November, 2016.

15  
16  
17 *Shannon R. Welch*  
18 SHANNON R. WELCH, RMR, CRR  
19 OFFICIAL COURT REPORTER  
20 UNITED STATES DISTRICT COURT  
21  
22  
23  
24  
25